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16  
17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 COLUMBIA PICTURES INDUSTRIES,  
INC., et al.,

20 Plaintiffs,

21 v.

22 GARY FUNG, et al.,

23 Defendants.  
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26  
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**Case No. CV 06-5578-SVW (JCx)**

**DEFENDANTS GARY FUNG AND  
ISOHUNT WEB TECHNOLOGIES,  
INC.'S REPLY IN SUPPORT OF  
THEIR MOTIONS *IN LIMINE* NOS.  
1-9**

Hearing Date: October 28, 2013  
Time: 1:30 p.m.  
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**I. INTRODUCTION**

Plaintiffs' Opposition merely confirms their trial strategy of wasting the Court's time and the parties' resources with extraneous matters, and distracting the jury with evidence with little (if any) probative value that if permitted would pose a significant risk of prejudicing the jury. Plaintiffs seek to stack the deck in their favor so that the jury is allowed only to consider negative facts associated with this Court's finding of inducement liability, even where the facts are not sufficiently relevant to the jury's decision to overcome the prejudice to Defendants, and even where it requires the Court to disregard due process and fundamental fairness. The Court should decline to allow such evidence, and should instead exclude it for the reasons discussed in Defendants' motions *in limine* and herein.

**II. THE COURT SHOULD GRANT DEFENDANTS' MOTIONS *IN LIMINE***

**1. The Court Should Exclude Evidence Of Alleged Infringement  
Beyond The 44 Works Named Before The Liability Order**

At the eleventh hour, Plaintiffs have tried to expand the scope of potential liability in this case from 44 works (and maximum damages of \$6.6 million) to nearly four thousand works (and maximum damages of nearly \$600 million). Plaintiffs chose to expand the scope of their case far beyond what is reasonably necessary to achieve their goals, and seek potential damages far beyond what Defendants could conceivably pay. The Court asked Plaintiffs what the point was of seeking a damages award far beyond what Plaintiffs could ever actually recover:

THE COURT: What do you estimate to be the resources of  
[Defendants]? . . . What do you suspect?

PLAINTIFF'S COUNSEL: Based on our estimate, Your Honor, we  
believe a couple to a few million dollars would exhaust Mr. Fung's or  
defendants' ability to pay...

PLAINTIFF'S COUNSEL: A couple to a few million dollars would  
exhaust defendants' --

1 THE COURT: Does that mean, like \$2 million --

2 PLAINTIFF'S COUNSEL: Two million dollars to \$4 million, \$5 million  
3 at the most.

4 THE COURT: So why are you making such a fetish about 2,000 or 3,000  
5 or 10,000 or 100 copyrights?

6 MR. FABRIZIO: Your Honor, the purpose of statutory damages is not  
7 only to seek compensation from the defendants, extraordinarily important  
8 purpose is to create -- send a message to other would-be infringers like  
9 defendants, and there are thousands of them...

10 THE COURT: But if you strip him of all his assets -- and you're  
11 suggesting that a much lesser number of copyrights would accomplish --  
12 copyright infringements would accomplish that, where is the deterrence  
13 by telling the world that you took someone's resources away because of  
14 illegal conduct entirely or 50 times over?

15 [9/9/13 Trans. 7:23-9:11 (emphasis added).]

16 Plaintiffs seek here to obtain a massive \$600 million judgment against an  
17 individual Defendant, Gary Fung, and his small company. Knowing they could never  
18 collect anything close to \$600 million, they insist on sending a "message." Whatever  
19 additional and incremental difference it makes, it is not enough to justify the  
20 tremendous waste of the Court's and parties' resources to expand Plaintiff's case  
21 exponentially. Particularly in light of *Plaintiffs'* choice to so massively expand the  
22 scope of their case, Defendants must be given a reasonable and fair opportunity to  
23 prepare their case before trial as to the nearly four thousand works Plaintiffs now seek  
24 to add. The Court should decline to permit the expansion and application of earlier  
25 liability findings where Defendants have not been provided a meaningful opportunity  
26 to prepare their defenses regarding the newly named works. Plaintiffs highlight the  
27 sheer magnitude of their newly-alleged infringements, conceding that only on  
28 September 19, 2013, did they produce "over 3.5 terabytes of content files." Dkt. 668



1 at 17:16. By way of reference, a typical movie file on Plaintiffs hard drive, Beverly  
2 Hills Cop, has a filesize of 700 megabytes and a total running time of just over one  
3 hour and 45 minutes. At that rate, it would take 8,750 hours to view all of the 3.5  
4 terabytes of content on that hard drive alone. Declaration of Thomas Kearney  
5 (“Kearney Dec.”) ¶ 4.

6 Moreover, Plaintiffs have continued to produce documents of all types,  
7 including additional dot-torrent files; thousands of megabytes of content files; server  
8 log data purportedly relevant to direct infringements; and ownership documents.  
9 Kearney Dec. ¶¶ 2-3. Plaintiffs concede—indeed, insist—that reviewing this material  
10 is extremely burdensome and time-consuming, but nonetheless state that “Defendants  
11 cannot claim burden ... in any delays in Plaintiffs’ review process.” Opp. at 18:12-14.  
12 And Plaintiffs’ delays continue: Plaintiffs’ most recent document production was just  
13 *two days ago*, on Monday, October 13. Kearney Dec. ¶ 3. As detailed in Section II.3  
14 below, Plaintiffs have produced more than 400 pages of copyright registrations and  
15 chain of title documents, and thousands of megabytes of dot-torrent files, content files,  
16 and server log entries purportedly evidencing direct infringements, since Defendants  
17 filed their Motions in Limine on September 30, 2013. Defendants are unable to  
18 conduct a meaningful investigation given the number of alleged infringements and  
19 alleged content files, and the fact that Plaintiffs continue to produce basic documents  
20 to support their claims and still have not committed to a date by which their  
21 production will be complete. The Court should grant Defendants’ Motion *in Limine*.

22 **2. The Court Should Exclude Evidence Of Damages Consistent With**  
23 **Due Process**

24 Plaintiffs do not bother to address the numerous cases that hold that to comport  
25 with due process, a defendant must be afforded notice of the claims asserted so it can  
26 properly assess the case and adequately prepare a defense. *See Urbont v. Sony Music*  
27 *Entm’t*, 863 F. Supp. 2d 279, 288 (S.D.N.Y. 2012) (citing *Kwan v. Schlein*, 634 F.3d  
28 224, 228 (2d Cir. 2011)); *Jaso v. The Coca Cola Co.*, 435 Fed. App’x 346, 352 (2011)



1 (“each act of infringement gives rise to an independent claim”) (emphasis in original);  
2 *Southern v. All Points Delivery Sys., Inc.*, No. 04-cv-590, 2006 WL 521501, at \*1 n.1  
3 (N.D. Okla. Mar. 2, 2006) (“because each alleged infringement forms a separate  
4 claim, the Court requests more precision from the parties in future pleadings”); *Gee v.*  
5 *CBS, Inc.*, 471 F. Supp. 600, 643 (E.D. Pa. 1979), *aff’d* 612 F.2d 572 (3d Cir. 1979)  
6 (holding a complaint must state, *inter alia*, “which specific original work is the subject  
7 of the copyright claim . . . and by what acts and during what time defendant has  
8 infringed the copyright”); *see also La. Pac. Corp. v. James Hardie Bldg. Prods., Inc.*,  
9 2012 WL 5520394, at \*1 (N.D. Cal. Nov. 14, 2012) (holding that plaintiff was  
10 required to “identify every trademark which was allegedly infringed”; stating that this  
11 requirement “is necessary to provide Defendant with adequate notice” because, where  
12 the complaint only identifies some of the allegedly infringed marks, this “leaves  
13 Defendant to guess at the others. This is insufficient.”).

14 While Plaintiffs argue that identifying just forty-four works gives sufficient  
15 notice of the nearly 4,000 works they now claim, the cases they cite in support of that  
16 argument are readily distinguishable. In *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684,  
17 687 (9th Cir. 2000), the copyright holder sued for declaratory judgment as to two  
18 songs by the same artist, and pre-lawsuit correspondence between the parties made  
19 clear that the dispute involved both works. In *Tin Pan Apple v. Miller Brewing Co.*,  
20 737 F. Supp. 826, 828 (S.D.N.Y. 1990), plaintiffs claimed infringement as to “one or  
21 more” of its songs. 737 F. Supp. at 828-29. Here, Plaintiffs are not seeking damages  
22 for only one or two works, but nearly 4,000 works, of which they had previously  
23 identified only about *one percent*. Similarly, in *E. Broad. Am. Corp. v. Universal*  
24 *Video, Inc.*, CV-04-5654 (DGT), 2006 WL 767871, at \*1, 3 (E.D.N.Y. Mar. 24,  
25 2006), although the plaintiff did not specify exactly which works it claimed had been  
26 infringed, the plaintiff attached an exhibit to its complaint listing all of the 126  
27 television shows to which it owned copyrights, and which therefore defined the  
28 universe of its claims. By contrast, Plaintiffs failed to produce a list of their claimed

works until more than six years after they filed their complaint, just weeks before trial. Moreover, the *Universal Video* court noted that “[a]ny confusion as to which of these copyrighted works are the subject of the complaint ‘may be explored on discovery.’” *Id.* at \*3 (quoting *Tin Pan Apple*). But Defendants’ efforts in this case to explore these subjects through discovery have been delayed or thwarted by Plaintiffs at every turn.

**3. Plaintiffs Should Be Precluded From Presenting Evidence Of Allegedly Infringing Videos For Which Plaintiffs Have Not Demonstrated Ownership Of Copyright And A Timely Obtained U.S. Copyright Registration**

It is Plaintiffs’ burden to prove ownership of a valid copyright as part of their *prima facie* case of copyright infringement, but for hundreds of their alleged works, Plaintiffs have failed to do so. The Court should preclude Plaintiffs from presenting evidence concerning works for which Plaintiffs have failed to carry their burden.

Plaintiffs insisted when they filed their motion for summary judgment on ownership on September 30, 2013, that their production of documents concerning ownership was complete. Pl. MSJ (filed under seal 9/30/13) at 6 n.3 (“Plaintiffs ... have produced all of the underlying [ownership] documents in discovery ... to Defendants”). But since then, Plaintiffs have continued to supplement their production of ownership and other documents at least six times, and have also continued to produce thousands of megabytes of data for Defendants to try and sort through and address in their briefings and pretrial disclosures less than a month before trial.

- October 5 – Plaintiffs produce 239 pages of chain-of-title documents
- October 8 - Plaintiffs produce 23 pages of chain-of-title and copyright registration documents
- October 9 - Plaintiffs produce 153 pages of chain-of-title and copyright registration documents; three additional dot-torrent files; one additional video file; and thousands of additional purported download events

1           • October 10 - Plaintiffs produce 8 pages of chain-of-title documents; 3  
2           additional dot-torrent files; 25 additional video files; and more than 8,000  
3           additional purported download events  
4           • October 11 - Plaintiffs produce 7 pages of chain-of-title documents  
5           • October 13 - Plaintiffs produce 4 pages of chain-of-title documents  
6           Kearney Dec. ¶¶ 2-3. To the extent Plaintiffs have failed to establish  
7 ownership of allegedly infringed works they should be precluded from offering  
8 evidence of alleged infringements of such works as any such evidence would be  
9 irrelevant and prejudicial.

10           **4. Plaintiffs Should Be Precluded From Submitting Evidence Of**  
11           **Allegedly Infringing Videos For Which Plaintiffs Have Failed To**  
12           **Identify A Download By A U.S. User**

13           Plaintiffs concede that even they have had to devote thousands of hours to  
14 analyzing the alleged infringements, *see, e.g.*, Opp. at 18 n.5 (review “required  
15 thousands of hours of lawyer and paralegal time”); Decl. of Steven B. Fabrizio (Dkt.  
16 668-1) ¶ 4; 9/30/13 Hrg. Trans. 19:25-20:4, and are not yet done identifying them.  
17 Decl. of Bruce Ward (Dkt. 658) ¶¶ 17-19. Plaintiffs have had more than six years  
18 since the case started to identify their own allegedly infringed works; it took them two  
19 months from the time the Court ordered them to identify the works for which they  
20 claimed damages, and weeks more to identify any (though still not all) alleged  
21 infringements of those works. Yet Plaintiffs expect Defendants (with far more limited  
22 resources than Plaintiffs) to be able to adequately analyze this mountain of data in a  
23 few weeks or less. As did Plaintiffs, Defendants need time, and at least two months, to  
24 investigate the alleged infringements and prepare to rebut Plaintiffs’ claims.

25           This Court has made clear that in order for Plaintiffs to establish infringement  
26 they must establish an infringing download by a U.S. user. Plaintiffs should be  
27 precluded from introducing evidence of allegedly infringing videos for which  
28 Plaintiffs have failed to do so. To the extent Plaintiffs’ expert Bruce Ward relied on

1 inaccurate or unauthenticated geolocation data in his analysis, it is unreliable and  
2 should be disregarded. *See* Opp. to MSJ on Ownership, Causation and Direct  
3 Infringement (Dkt. 671) at 14-20; Decl. of Robin H. Johnson (Dkt. 671-4) ¶¶ 7-10.

4 **5. Plaintiffs Should Be Precluded From Introducing Evidence Of The**  
5 **Incidence Of Alleged Infringements Given That Plaintiffs’ Election**  
6 **Of Statutory Damages Only Requires One Infringement Per Work**

7 The Court may exclude evidence if it will cause “undue delay, wasting time, or  
8 needlessly presenting cumulative evidence.” Fed. R. Evid. 403. The incidence of  
9 alleged infringements here is both unreliable, for all of the reasons addressed in the  
10 preceding section, and irrelevant, since Plaintiffs need show only one infringement by  
11 a U.S. user per work. Plaintiffs do not dispute that to obtain maximum available  
12 statutory damages, they are only required to demonstrate *one* infringement of the  
13 work. Evidence about the incidence of infringements has been held not relevant in  
14 cases where plaintiffs have elected statutory damages, because of the limitation on the  
15 amount of damages associated with a single work. Because “[i]t is sufficient that one  
16 instance of infringement occurred during the statutory period,” it is “irrelevant how  
17 many instances of actual infringement occurred.” *King Records, Inc. v. Bennett*, 438  
18 F. Supp. 2d 812, 867 (M.D. Tenn. 2006) (“it is irrelevant how many instances of  
19 actual infringement occurred. It is sufficient that one instance of infringement  
20 occurred during the statutory period.”); *UMG Recordings, Inc. v. MP3.COM, Inc.*,  
21 109 F. Supp. 2d 223, 224 (S.D.N.Y. 2000) (“for the purpose of computing statutory  
22 damages, the relevant unit is not the number of infringements but the number of  
23 infringed ‘works’”); *see also, Columbia Pictures Television v. Krypton Broad. of*  
24 *Birmingham, Inc.*, 106 F.3d 284, 294 (9th Cir. 1997), *rev’d on other grounds, Feltner*  
25 *v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (“when statutory damages  
26 are assessed against one defendant . . . each work infringed may form the basis of  
27 only one award, regardless of the number of separate infringements of that work”)  
28 (citing *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 143-44 (5th Cir. 1992)); *see*

1 also, e.g., *Agence France Presse v. Morel*, --- F. Supp. 2d ---, 2013 WL 146035, at  
2 \*26 (S.D.N.Y. Jan. 14, 2013), *reconsideration granted in part*, 10 CIV. 02730 AJN,  
3 2013 WL 2253965 (S.D.N.Y. May 21, 2013) (where “a single infringer has engaged  
4 in any number of infringements for which that infringer is liable individually, . . .  
5 [n]either the number of infringements of a particular work nor the number of  
6 infringers of that work is relevant to the damages calculation in these  
7 circumstances”).)

8 Plaintiffs suggest that their expert can introduce this supposed evidence rather  
9 than spending time demonstrating each one—but without affording Defendants a fair  
10 chance to investigate and test this evidence, such testimony is rendered little more  
11 than conclusory and untested speculation. *Wicker v. Oregon ex rel. Bureau of Labor*,  
12 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse discretion in  
13 excluding conclusive, speculative evidence).

14 Even if Defendants had been provided a fair and reasonable opportunity to  
15 investigate the alleged infringements—which they have not—it would be an enormous  
16 burden on the Court and the parties to permit this evidence. Plaintiffs will already  
17 need to demonstrate at least one of the underlying infringements for each of the more  
18 than 4,000 works. To then permit Plaintiffs to introduce evidence of allegedly  
19 thousands of examples of alleged infringements for each of those works, where  
20 Defendants must be permitted the opportunity to rebut such evidence, would make for  
21 an unmanageable and unwieldy trial. The probative value is not worth the added  
22 burden, when Plaintiff can qualify for statutory damages merely by demonstrating a  
23 single infringement of one work. Under Rule 403 evidence may also be excluded if  
24 the waste of time caused by its introduction outweighs its probative value. If Plaintiffs  
25 are allowed to present evidence regarding the incidence of alleged infringement, due  
26 process demands that Defendants be provided the opportunity to present rebuttal  
27 evidence about each alleged infringement. Such instances have *not* all been produced  
28

1 by Plaintiffs, and it remains unclear which ones they are claiming. It would thus be a  
2 duplicative waste of time to allow this evidence in, and the Court should exclude it.

3 **6. Plaintiffs Should Be Precluded From Submitting Evidence Relating**  
4 **To Press Articles, Blogs And Third Party Communications**  
5 **Regarding Unrelated Claims Or Infringement**

6 Plaintiffs do not even attempt to explain the relevance of any specific blogs or  
7 press articles by third parties, or how they intend to establish any proper foundation  
8 for the evidence. Instead, they seek to introduce uncorroborated third party statements  
9 about alleged infringement on Defendants' websites and statements made by Gary  
10 Fung that have nothing to do with the alleged infringements in this case. *See, e.g.*,  
11 Trial Ex. Nos. 9-10, 22 (Screenshots from Isohunt.com of forum posts); Trial Ex. No.  
12 14 (Fung Interview on Slyck.com, dated February 21, 2005); Trial Ex. No. 173 (Fung  
13 interview: "Realplayer" copy of interview on a CD).

14 First, these and similar communications are not relevant to the damages portion  
15 of this trial. To the extent Plaintiffs seek to re-try the liability phase of this case—on  
16 which they have already prevailed—they should be precluded from doing so. The  
17 evidence Plaintiffs seek to use is irrelevant to any of the alleged acts of direct  
18 infringement in this action. This alone is sufficient reason to exclude this evidence  
19 pursuant to Rule 402. Further, under Rule 901, Plaintiffs have not (and cannot)  
20 authenticated or laid any foundation regarding the knowledge of third-party users of  
21 isoHunt and others, nor the extent to which they have reviewed Defendants' site for  
22 infringement (or would even know which videos might be potentially infringing).  
23 Any such evidence from third parties should be precluded.

24 Further, any statements by Defendants should be limited to those involving  
25 alleged infringements in this case. Otherwise, there is a serious risk that it would  
26 prejudice Defendants, because a jury might decide they disagree with Mr. Fung's  
27 personal views, and therefore assess damages on the basis of their prejudice.  
28 Evidence is unfairly prejudicial if it has an "undue tendency to suggest decision on an



1 improper basis.” Fed. R. Evid. 403, Advisory Comm. Notes, 1972 Proposed Rules.  
2 That is precisely what Plaintiffs’ unrelated evidence seeks to do.

3 The Court should thus exercise its discretion to exclude such communications  
4 and evidence as inadmissible hearsay, or because its probative value is substantially  
5 outweighed by a “danger of . . . unfair prejudice, confusing the issues [or] misleading  
6 the jury...” Fed. R. Evid. 403.

7 **7. To Preclude Plaintiffs From Mentioning Discovery Rulings,**  
8 **Including Any Monetary Or Other Discovery Sanctions/Alleged**  
9 **Violation Of Court Orders**

10 Plaintiffs do not cite a single copyright case that finds it appropriate for the jury  
11 to consider sanctions or discovery misconduct in deciding “statutory damages.” In  
12 response to Defendants’ argument that evidence of sanctions and alleged violations of  
13 court orders is irrelevant and unduly prejudicial, Plaintiffs argue that the jury may  
14 consider “litigation conduct” of the parties when assessing statutory damages.  
15 Plaintiffs’ authorities are inapposite. What Plaintiffs attempt to characterize as  
16 “litigation conduct” has nothing to do with the type of evidence Plaintiffs seek  
17 inappropriately to introduce here.

18 In *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 985-86 (9th Cir.  
19 2009), the Ninth Circuit considered whether the district court erred in excluding  
20 evidence that the plaintiff had illegally operated the copyrighted video game in two  
21 states. The court noted that the jury “may consider plaintiff’s conduct during  
22 litigation,” *id.* at 992-93 (emphasis added), and cited two cases in which statutory  
23 damages were reduced due to the *plaintiff’s* bad conduct. *Id.*; see also *id.* at 993  
24 (listing “plaintiff’s conduct during litigation” as a factor the jury can consider in  
25 awarding statutory damages). Ultimately, the court affirmed the district court’s  
26 decision that the evidence’s probative value was outweighed by unfair prejudice. *Id.*  
27 As the clear prejudice to Defendants by permitting this evidence is readily apparent,  
28 the Court should decline to adopt Plaintiffs’ expansive and unsupported application of



1 “litigation conduct” when none of the cases they cite uses that principle to allow  
2 irrelevant evidence about discovery or other sanctions.

3 Moreover, *Warner Bros. Home Entm't Inc. v. FilmAndMusic USA, LLC*, CV 13-  
4 00874 SJO JCX, 2013 WL 4478956 (C.D. Cal. Aug. 20, 2013), simply recites a list of  
5 factors that juries often consider when awarding statutory damages, including whether  
6 defendant has cooperated in providing records relevant to damages analysis.<sup>1</sup> Unlike  
7 such cases, here Plaintiffs seek to use highly prejudicial evidence regarding sanctions,  
8 violations of court orders, or other irrelevant litigation conduct that has no bearing on  
9 a damages analysis, in order to increase the damages awarded against Defendants.

10 Plaintiffs also fail to address the line of cases where courts have granted  
11 motions to exclude references to adverse court rulings and sanctions that have little or  
12 no probative value, as here. *See, e.g., Phillip M. Adams & Assocs., LLC v. Winbond*  
13 *Elecs. Corp.*, 1:05-CV-64 TS, 2010 WL 3767318, at \*5 (D. Utah Sept. 16, 2010)  
14 (granting sanctions against defendant for spoliation of evidence but ordering that, “due  
15 to the danger of prejudicing the jury,” plaintiff may not state or imply “that the Court  
16 has made a finding of wrongdoing on [defendant’s] part” or otherwise “that the Court  
17 has sanctioned [defendant]”); *3Com Corp. v. Realtek Semiconductor Corp.*, C 03-  
18 2177 VRW, 2008 WL 783383, at \*2 (N.D. Cal. Mar. 24, 2008) (granting plaintiff’s  
19 motion *in limine* to preclude defendant from referring to or introducing evidence of  
20 the court’s prior sanctions order or the fact that sanctions had been granted); *Faigin v.*  
21 *Kelly*, 184 F.3d 67, 80 (1st Cir. 1999) (“A lay jury is quite likely to give special  
22 weight to judicial findings merely because they are judicial findings. . . .  
23 Consequently, courts, recognizing the attendant danger of jury confusion and unfair  
24 prejudice, frequently have approved the exclusion of judicial findings, convictions,  
25 and similar evidence on Rule 403 grounds.”) (internal citation omitted).

26 <sup>1</sup> It is worth noting that this case, like many others Plaintiffs have cited in this and  
27 prior briefing, lists “[t]he expenses saved and the profits reaped” and “the revenues  
28 lost by the plaintiff” as relevant factors that juries often consider in awarding statutory  
damages. *Id.* at \*6 (internal quotation marks omitted); *see also id.* (“Plaintiff offers no  
evidence regarding its own losses . . .”). Nonetheless Plaintiffs continue their efforts  
to avoid providing such discovery.

**8. To Preclude Plaintiffs From Presenting Evidence Responsive But Not Timely Produced In Response To Required Disclosures Or Defendants’ Discovery Requests Including Expert Disclosures**

Plaintiffs have informed Defendants that they plan to use, introduce or otherwise refer to an extensive range of materials that they failed to disclose or produce in a timely fashion. Plaintiffs now argue that their late production of documents is really “timely” because they made a “substantial” production on September 19, 2013, the date their written responses were due—and the date by which they had promised to produce responsive documents. Opp. at 17:2. Plaintiffs also make the contradictory arguments that their untimely production was due to Defendants’ having propounded discovery requests “weeks” after the Court set a trial date (Opp. at 17:3-4); that Defendants suffered no prejudice from Plaintiffs’ late production because they could simply have reviewed their server log data and somehow divined what data Plaintiffs would select as evidence of direct infringements (Opp. at 18:18-19:1); that Plaintiffs expended time in producing the documents they did actually produce (Opp. at 17:20-22).

None of this should distract the Court from the simple fact that Plaintiffs failed to timely produce thousands of pages of purported ownership documents, numerous dot-torrent and content files, and thousands of alleged “download events” relating to alleged direct infringements; *continued* to produce documents, including ownership documents, even after announcing to the Court that their production was complete; and have refused to provide a date certain for completion of their production. Kearney Decl. ¶¶ 2-3; *see, e.g.,* Ward Dec. at ¶ 18 (“The process of identifying and analyzing more dot-torrent files in Defendants’ web server logs that correspond to Plaintiffs works is ongoing, and, as requested by Plaintiffs’ counsel, I will continue to update the U.S. download counts accordingly”).

Plaintiffs should not be permitted to use or reference such late-produced evidence of alleged ownership or infringements. “If a party fails to provide

1 information or identify a witness as required by Rule 26(a) or (e), the party is not  
2 allowed to use that information or witness to supply evidence on a motion, at a  
3 hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed.  
4 R. Civ. P. 37(c)(1). Motions *in limine* are appropriate to preclude the introduction at  
5 trial of evidence not produced in discovery. *Reyes v. City of Glendale*, No. CV 05-  
6 0253 CAS (MANx), 2009 WL 2579614, at \*4 (C.D. Cal. Aug. 19, 2009) (“To the  
7 extent that plaintiff seeks to produce new documents or evidence not previously  
8 disclosed in the case, the Court finds such evidence should be excluded, except for the  
9 purposes of impeachment or rebuttal.”), *id.* at \*10 (granting motion *in limine* “to the  
10 extent it seeks to exclude evidence not previously disclosed in conjunction with the  
11 motions for summary judgment or otherwise”); *Lincoln Diagnostics v. Panatrex, Inc.*,  
12 No. 07-CV-2077, 2009 WL 3010840, at \*5 (C.D. Ill. Sept. 16, 2009) (“any documents  
13 relevant to the issue of damages that Defendant did not produce prior to the ‘drop  
14 dead’ date . . . could not be presented by Defendant at trial.”). Plaintiffs should not be  
15 allowed to use discovery materials that were not timely produced during fact  
16 discovery.

17 During the course of fact discovery, Defendants served Plaintiffs with  
18 interrogatories and requests for documents specifically directed to key issues of  
19 identification of their alleged works; ownership of the alleged works and  
20 corresponding registrations; identification of direct infringements by U.S. users;  
21 causation; willfulness; damages; and Defendants’ defenses of fair use and failure to  
22 mitigate damages. Plaintiffs refused to answer nearly all of Defendants’  
23 interrogatories; refused to provide documents responsive to the majority of  
24 Defendants’ document requests (and refused to produce *any* documents in key  
25 categories of requests such as damages); and refused to identify direct infringements  
26 of their alleged works. *See* Dkt. 615. Plaintiffs also failed to timely provide documents  
27 in the few categories of discovery they did agree to produce.

1 If Plaintiffs are permitted to introduce at trial this untimely-produced evidence,  
2 Defendants will be severely prejudiced. Plaintiffs will have the benefit of relying upon  
3 evidence improperly withheld from Defendants, which Defendants have not had  
4 adequate opportunity to review, analyze and investigate. At a minimum, Plaintiffs  
5 should be precluded from relying on documents they failed to provide either before, or  
6 in connection with, their motions for summary judgment concerning ownership and  
7 direct infringement.

8 **9. To Limit Instruction Of Willfulness For Infringement To Those For**  
9 **Which Plaintiffs Have Produced Evidence Of Defendants’**  
10 **Knowledge Of The Infringements**

11 Plaintiffs have not and cannot dispute that court after court has found a  
12 defendant’s infringements *non-willful* with respect to works for which the defendant  
13 had no notice of alleged infringements. Indeed, courts routinely require knowledge to  
14 find willfulness, holding infringement willful only with respect to post-notice  
15 infringements. *See, e.g., Columbia Pictures Indus., Inc. v. Sandrow*, CIV. A. No. 87-  
16 3279, 1988 WL 28249, at \*4 (E.D. Pa. Mar. 23, 1988) (finding “defendants’ copyright  
17 infringement was not wil[l]ful [for works infringed] prior to the receipt of [plaintiffs’]  
18 ‘cease and desist’ letter” but was willful for works infringed thereafter); *Bridgeport*  
19 *Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 268-69 (6th Cir. 2009) (jury  
20 instruction “correct” when it stated “[a]n infringement becomes a willful infringement  
21 if a defendant acquires knowledge that its actions infringe a copyright and the  
22 defendant nevertheless continues such infringement”).

23 Plaintiffs also do not and cannot dispute that courts routinely assess willfulness  
24 in the copyright context on a work-by-work basis. In numerous cases, juries have  
25 found some infringements of works at issue in the case “willful,” while finding other  
26 works at issue in the case non-willful. *See, e.g., Columbia Pictures Indus.*, 1988 WL  
27 28249, at \*4; *Psihoyos v. John Wiley & Sons, Inc.*, 11 CIV. 1416, 2013 WL 1285153,  
28 at \*1 (S.D.N.Y. Mar. 29, 2013) (in suit alleging copyright infringement as to four

1 photographs, jury found no infringement as to one photograph, non-willful  
2 infringement as to a second photograph, and willful infringement as to the remaining  
3 two photographs); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020-21 (7th  
4 Cir. 1991), *overruled on other grounds* by *Fogerty v. Fantasy, Inc.*, 510 U.S. 517  
5 (1994) (where jury found that defendant had willfully infringed plaintiff's copyrights  
6 in two out of seven films involved in the action, affirming district court's grant of  
7 defendant's motion for judgment notwithstanding the verdict because jury's verdict on  
8 issue of willfulness was unsupported by the evidence).

9 Plaintiffs also do not dispute that in the copyright context, "'willfully' means  
10 with knowledge that the defendant's conduct constitutes copyright infringement.'" *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 n.3 (9th Cir. 1990);  
11 *Krypton Broad.*, 106 F.3d at 293 (same); *Dolman v. Agee*, 157 F.3d 708, 715 (9th Cir.  
12 1998) (same); *see also Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 936 (N.D.  
13 Cal. 1996). Thus, "[g]enerally, a determination as to willfulness requires an  
14 assessment of a party's state of mind." *Id.* Because Plaintiffs bear the burden of  
15 establishing that Defendants willfully infringed their copyrights, the Court should not  
16 relieve Plaintiffs of their burden. 17 U.S.C. § 504(c)(2) ("the copyright owner [must]  
17 sustain[] the burden of proving . . . that infringement was committed willfully").  
18

19 Plaintiffs decline to address any of this authority because they contend that the  
20 "Court already has granted Plaintiffs' summary judgment motion on willfulness." But  
21 the Court took that Motion under submission (Dkt. 675). The Court indicated that it  
22 intended to raise the ceiling of maximum permissible statutory damages, but left open  
23 the possibility that Defendants could introduce mitigating or challenging evidence as  
24 to willfulness. Thus, even assuming this Court enters an order finding willfulness as a  
25 matter of law, the only practical impact is that the ceiling for statutory damages is  
26 raised to \$150,000. This would not eliminate Defendants' right to introduce evidence  
27 relating to the relative culpability of Defendants' conduct, which is unquestionably a  
28 factor relevant to the award of statutory damages. The degree of willfulness must still

1 be evaluated because it is relevant to selecting an appropriate amount of damages.  
2 Professor Nimmer has stated that “the determination of statutory damages within the  
3 applicable limits may turn upon such factors as . . . the revenues lost by the plaintiffs  
4 as a result of the defendant’s conduct and the infringers’ state of mind – whether  
5 willful, knowing or innocent.” 4 Nimmer on Copyright § 14.04 [B][1][a] (2005). As  
6 Plaintiffs also acknowledge, “the level of egregiousness of Defendants’ infringement”  
7 is “a primary consideration for the jury in determining the appropriate level of  
8 statutory damages.” (Pl. Mot. in Limine (Dkt. 632) at 5.) Evidence rebutting the  
9 alleged *egregiousness* of Defendants’ infringement will inform the jury in reaching of  
10 an appropriate award of damages in this case, and their state of mind regarding the  
11 infringements at issue.

12 Courts also routinely assess willfulness in the copyright context on a work-by-  
13 work basis. Numerous courts have found a defendant’s infringements willful with  
14 respect to only certain works at issue, but non-willful with respect to others. *See, e.g.,*  
15 *Columbia Pictures Indus., Inc. v. Sandrow*, CIV. A. No. 87-3279, 1988 WL 28249, at  
16 \*4 (E.D. Pa. Mar. 23, 1988) (finding “defendants’ copyright infringement was not  
17 wil[l]ful [for works infringed] prior to the receipt of [plaintiffs’] ‘cease and desist’  
18 letter” but was willful for works infringed thereafter; awarding damages accordingly);  
19 *Psihoyos v. John Wiley & Sons, Inc.*, 11 CIV. 1416, 2013 WL 1285153, at \*1  
20 (S.D.N.Y. Mar. 29, 2013) (in suit alleging copyright infringement as to four  
21 photographs, jury found no infringement as to one photograph, non-willful  
22 infringement as to a second photograph, and willful infringement as to the remaining  
23 two photographs); *Video Views*, 925 F.2d at 1020-21 (where jury found that defendant  
24 had willfully infringed plaintiff’s copyrights in two out of seven films involved in the  
25 action, affirming district court’s grant of defendant’s motion for judgment  
26 notwithstanding the verdict because jury’s verdict on issue of willfulness was  
27 unsupported by the evidence).

28 Because here the question of willfulness should be dealt with on a work-by-



work basis in properly assessing statutory damages on a work-by-work basis, the Court should restrict any willfulness instruction to those for which Plaintiffs have produced some evidence of knowledge by Defendants.

### III. CONCLUSION

For all the reasons set forth in their Motion and herein, Defendants respectfully request that the Court grant their Motions *in Limine* Nos. 1-9.

Dated: October 16, 2013

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